Supreme Court, U.S.
FILED
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NO. 93-1482

IN THE

Supreme Court of the United States

JESSIE ROSE, WIDOW OF GUY T. ROSE,

Petitioner,

V.

WESTMORELAND COAL COMPANY, AND
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

FROM THE UNITED STATES FOURTH CIRCUIT COURT OF APPEALS

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54 pp

QUESTION PRESENTED FOR REVIEW

WHETHER ALJ FELDMAN VIOLATED 5 U.S.C. 557 (c) (3) (A) AND 20 C.F.R. 410.490 WHEN HE IGNORED (DID NOT CONSIDER) THE NIOSH (NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH) X-RAY AND THE EMPLOYER'S IN-HOUSE RECORDS ESTABLISHING PNEUMOCONIOSIS.

TABLE OF CONTENTS & AUTHORITIES

PAGE

Question Presented for Review 2

Table of Contents & Authorities 3

Reference to Reports of Opinions 5

Grounds on Which Jurisdiction of the

Court is Invoked 6

Statutes and Regulations Invoked 7

Statement of the Case 8

Basis of Jurisdiction in the 4th Circuit 9

Argument 10

Appendix 11

Order denying Petition to Rehearing 11

Decision/Judgment of 4th Circuit 13

Decision of BRB 16

Decision of ALJ 26

Decision of 4th Cir - remanding case 39

20 C.F.R. 410.490 48

5 USC 557 (c) (3) (A) 53

REFERENCE TO REPORTS OF OPINIONS

1. Jessie Rose v. Westmoreland Coal Company; Director, OWCP, 4th Cir. Slip Op. 88-1974 decided June 26, 1989, remanding case to BRB and ALJ .....

2. Jessie Rose v. Westmoreland Coal Company; Director, OWCP, AJ Feldman's Decision and Order on Remand Denying Benefits issued April 1, 1990 .....

3. Jessie Rose v. Westmoreland Coal Company; Director, OWCP, BRB per curiam Decision and Order issued March 24, 1993, affirming ALJ decision .....

4. Jessie Rose v. Westmoreland Coal Company; Director, OWCP, 4th Cir. Slip Op. 93-1624 decided November 23, 1993 affirming BRB decision .....

5. Jessie Rose v. Westmoreland Coal Company; Director, OWCP, 93-1624 decided December 21, 1993 denying Petition for Rehearing .....

GROUNDS ON WHICH JURISDICTION OF THE COURT IS INVOKED

1. Judgement entered November 23, 1993

2. Judgement denying Petition for Rehearing entered December 21, 1993.

3. 28 U. S. C. 1254 (1) confers jurisdiction on this Court to review the judgment in question.

STATUTES & REGULATIONS INVOLVED

20 C.F.R. 410.490 (text set out in Appendix)

5 U.S.C. 557 (C) (3) (A) (text set out in Appendix)

STATEMENT OF THE CASE

The contention of Ms. Rose, the Petitioner, in this Black Lung case is not that the ALJ failed to adequately consider all of the x-ray evidence contained in the record, but that the ALJ totally ignored, (did not mention or consider at all) the NIOSH x-ray evidence and the Westmoreland work records, both establishing Pneumoconiosis. The ALJ failed to give any reasons why ignored these two pieces of substantial evidence, an explanation which is required by Director, OWCP v. Congelton 743 F. 2d 428, 430 (6th Cir. 1984) and 4 U.S.C.A. 557 (c) (3) (A). HEW (predecessor to Director OWCP) and Westmoreland (the employer) admitted that Guy Rose had Black Lung in 1974. The ALJ failed to explain why he totally ignored and did not consider this evidence of Pneumoconiosis.

BASIS OF JURISDICTION IN FOURTH CIRCUIT

The Fourth Circuit was permitted to review the findings of facts and the conclusions of law of ALJ Feldman and determine whether those findings and conclusions are (1) supported by substantial evidence in the record considered as a whole and are (2) in accordance with the law. 20 C.F.R. 802.301.

ARGUMENT

I am Petitioning this Court on behalf of Mrs. Rose because the Fourth Circuit let stand an ALJ ruling that Mrs. Rose's husband did not have pneumoconiosis, where the record shows that Rose's employer and NIOSH (the U.S. Government agency making pneumoconiosis determinations) told Mr. Rose in 1974 that he did have pneumoconiosis.

It is not the law of this land that a person's government and employer can both escape the consequences of their own admissions in a Black Lung case under 20 C.F.R. 410.490.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
December 21, 1993

No. 93-1624
90-1379-BLA

JESSIE ROSE, Widow of Guy T. Rose

Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED DEPARTMENT OF LABOR; WESTMORELAND COAL COMPANY, INCORPORATED

Respondents

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel

requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JESSIE ROSE, Widow of Guy T. Rose,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; WESTMORELAND COAL COMPANY, INCORPORATED,

Respondents.

On Petition for Review of an Order
of the Benefits Review Board,
(90-1379-BLA)

Argued: October 29, 1993

Decided: November 23, 1993

Before HALL, WILKINS, and LUTTIG,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Henry Smith Keuling-Stout, KEULING-STOUT, P.C., Big Stone Gap, Virginia, for Petitioner. Douglas Allan Smoot, JACKSON & KELLY, Charleston, West Virginia, for Respondents.

ON BRIEF: Ann B. Rembrandt, JACKSON & KELLY, Charleston, West Virginia, for Respondent Westmoreland Coal.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Jessie Rose, widow of miner Guy T. Rose, seeks review of the decision and order of the Benefits Review Board affirming an administrative law judge's (ALJ) denial of survivor's black lung benefits pursuant to 30 U.S.C.A. 901-45 (West 1986 & Supp. 1993). Rose contends that the ALJ failed to adequately consider all of the x-ray evidence contained in the record. Our review of the record discloses that the decision of the Board is based on substantial evidence and that this appeal is without merit. Accordingly, we affirm on the reasoning of the Board, *Rose v. Westmoreland Coal Co.*, No. 90-1379 (B.R.B. Mar. 24, 1993).

AFFIRMED

U.S. Department of Labor Benefits Review Board
800 K Street N.W.
Washington, D.C. 20001-8001

BRB No. 90-1379 BLA
OWCP No. 227-36-5551

JESSIE ROSE (Widow of GUY T. ROSE)	)	
Claimant-Petitioner	)	
v.	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED:
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Robert J. Feldman, Administrative Law Judge, United States Department of Labor.

Henry S. Keuling-Stout (Keuling-Stout & Bradshaw), Big Stone Gap, Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: SMITH, BROWN AND McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (84-BLA-4072) of Administrative Law Judge Robert J. Feldman denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. 901 *et seq.* (the Act). This case has previously been before the Board. In his original Decision and Order, after crediting the miner with nine years and eight months of coal mine employment, the administrative law judge determined that the regulations at 20 C.F.R. Part 410, Subpart D applied to the claim. However, the

administrative law judge found that claimant failed to establish entitlement pursuant to Part 410, Subpart D, and accordingly, denied benefits. Claimant appealed. By Decision and Order dated September 30, 1988, the Board affirmed the administrative law judge's finding of less than ten years of qualifying coal mine employment, and his determination that claimant failed to establish entitlement under 20 C.F.R. Part 410, Subpart D. *Rose v. Westmoreland Coal Co.*, BRB No. 87-1023 BLA (Sept. 30, 1988) (unpub.).

Claimant appealed the Board's decision to the United States Court of Appeals for the Fourth Circuit. Pursuant to its decision in *Broyles v. Director, OWCP,* 824 F.2d 327, 12 BLR 2-89 (4th Cir. 1987), *aff'd sub no. Pittson Coal Group v. Sebben,* 109 S.Ct. 414, 12 BLR 2-89 (1988), the Court remanded the case for application of

20 C.F.R. 410.490 to the claim. *Rose v. Westmoreland Coal Co.*, No. 88-1794 (4th Cir. June 26, 1989) (unpub.).

On remand, the administrative law judge found the evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. 410.490 (b) (1) (i) and (ii). Accordingly, the administrative law judge again denied benefits. On appeal, claimant challenges the administrative law judge's weighing of the x-ray evidence, and contends that the administrative law judge erred in failing to award benefits. Employer responds, arguing that the administrative law judge's Decision and Order on Remand is supported by substantial evidence, and should be affirmed. Claimant replys, reiterating her arguments against affirmance. The Director, Office of Workers' Compensation Programs, has not filed a brief

in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. 921(b) (3), as incorporated by 30 U.S.C. 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Contrary to claimant's contentions, the administrative law judge properly considered the five readings of the three x-rays in the record. Decision and Order on Remand at 2-3; Director's Exhibits 12, 23; Employer's Exhibits 3, 4. Claimant bears the burden of establishing the existence of pneumoconiosis at Section 410.490(b) (1) (i), by a preponderance of the evidence. *See Mullins Coal Co. of Virginia, Inc. v. Director,*

OWCP, 484 U.S. 135, 11 BLR 2-1 (1987); *Hamrick v. Schweiker*, 679 F.2d 1078, 4 BLR 2-110 (4th Cir. 1982); *Sharpless v. Califance*, 585 F.2d 664 (4th Cir. 1978). In the instant case, substantial evidence supports the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at Section 410.490(b)(1)(i). The administrative law judge properly accorded diminished weight to the x-ray readings of 1955 and 1959 as they are not properly classified pursuant to 20 C.F.R. 410.428. *See* 20 C.F.R. 410.428(a) (1) (i), (ii) and (iii); 727.206(a); *cf.*, *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Moreover, the administrative law judge properly found Dr. Barton's positive interpretation of the May 23, 1974 x-ray outweighed by the negative re-readings of B-readers, Drs. Lapp and Renn. *See Clark v. Karst-Robbins Coal Co.*,

12 BLR 1-149 (1989) *(en banc); Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The administrative law judge, therefore, properly determined that the weight of the x-ray evidence was negative for the existence of pneumoconiosis. *See Mullins, supra; Hamrick, supra.* As the record is devoid of autopsy and biopsy evidence, we affirm the administrative law judge's finding that claimant has failed to establish invocation of the presumption of total disability due to pneumoconiosis at 20 C.F.R. 410.490(b) (1) (i).[1]

---

[1] Claimant's contention that she is entitled to benefits because the miner was unable to perform his usual coal mine employment is meritless, as claimant has failed to meet her initial burden on invocation under Section 410.490 of establishing the presumption with either x-ray, autopsy or biopsy evidence. *See* 20 C.F.R. 410.490(b) (1) (i). Additionally, in light of the administrative law judge's affirmed finding of less than ten years of coal mine employment, Section 410.490 (b) (1) (ii) is inapplicable. *See* 20 C.F.R. 410.490 (b) (1) (ii); *Phipps v. Director, OWCP*, 17 BLR 1-39 (1992) (*en banc* with Smith, J., Concurring and McGranery, J., concurring and dissenting).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

CERTIFICATE OF SERVICE

BRB No. 90-1379 BLA: Jessie Rose (Widow of Guy T. Rose) v. Westmoreland Coal Company and Director, Office of Workers' Compensation Programs (Case No. 84-BLA-4072) (OWCP No. 227-36-5111)

I certify that this Decision and Order was sent this day to:

_____ _____

(DATE) Lisa L. Lahrman, Executive Counsel
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U.S. Department of Labor Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

In the Matter of	:	DATE ISSUED:
JESSIE ROSE, Widow of	:	CASE NO: 84-BLA-4072
GUY T. ROSE,	:	OWCP NO: 227-36-5551
Claimant,	:	
v.	:	
WESTMORELAND COAL COMPANY, Employer,	:	
and	:	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, party-in-Interest.	:	

Henry S. Keuling-Stout, Esq.
For the Claimant

Ann B. Rembrandt, Esq.
For the Employer

Before: ROBERT J. FELDMAN
Administrative Law Judge

DECISION AND ORDER ON REMAND
DENYING BENEFITS

This claim arises under the provisions of the Black Lung Benefits Act, 30 U.S.C. 901 et seq. and pertinent regulations promulgated thereunder.

Statement of the Case

On March 30, 1987, a Decision and Order was issued by the undersigned, denying benefits to the Claimant. The claimant appealed, and under date of September 30, 1988, the Benefits Review Board issued a Decision and Order in which the denial of benefits was affirmed. The Board found that my conclusions (a) that Claimant failed to establish ten years of coal mine employment, and (b) that the miner was not totally disabled due to pneumoconiosis at the time of his death or

that the miner's death was not due to pneumoconiosis, were rational and supported by substantial evidence. Accordingly, the Board upheld the determination that Claimant was not entitled to benefits under 20 CFR 410, Subpart D.

Subsequently, the Claimant filed a petition for review in the United States Court of Appeals for the Fourth Circuit, contending that her claim should have been reviewed under the provisions of 20 CFR 410.490, and that the failure to do so constituted reversible error. By its unpublished decision herein, No. 88-1794 (June 26, 1989), the Court of Appeals reversed the Benefits Review Board's decision, stating that the interim presumption of 410.490 must apply to claims such as the one at hand, involving miners with less than 10 years of coal mine employment which were filed prior to the promulgation

of the Part 718 permanent regulations. The case was therefore remanded for evaluation of the survivor's claim pursuant to 410.490.

Findings of Fact

Except as may be modified below, the Findings of Fact set forth in my decision dated March 20, 1987, are incorporated herein.

Claimant documented only 9 years and 8 months of coal mine employment. Therefore, the interim presumption of 727.203 could not be invoked, and the widow's claim was examined under 410, Subpart D. The medical opinions of record established that the miner was not totally disabled due to pneumoconiosis at the time of his death pursuant to 410.416. In addition, the medical reports and the death certificate indicated the miner's death was unrelated to any pulmonary condition.

Therefore, Claimant did not qualify for benefits under 410, Subpart D. The sole issue under reconsideration is whether Claimant is entitled to benefits under 410.490.

To summarize the pertinent evidence heretofore found, the record includes five readings of three x-rays. Dr. Barton, whose credentials are not found in the record, interpreted the October, 1955, x-ray as showing early fibrotic changes. The February, 1959, x-ray was reported to show moderate pulmonary fibrosis and pneumoconiosis with some silicotic changes, but the identity of the reader does not appear in the record, and neither this reading nor the previous reading conform with the classification requirements of 410.428. The May, 1974, x-ray was read by Dr. Barton as positive for pneumoconiosis, category 1. However, the later x-ray was also read by Dr. Lapp and Dr. Renn as showing no evidence of

pneumoconiosis. As Drs. Lapp and Renn are both B-readers, their opinions are credited as to the most recent x-ray. In addition, there are no pulmonary function studies or arterial blood gas tests of record. The death certificate lists the cause of death as cardiac arrhythmia due to myocardial infarction, making no mention of pneumoconiosis. No autopsy was performed, and there is no evidence of a biopsy in the record.

Conclusion of Law

Under 410.490, a miner will be presumed to be totally disabled from pneumoconiosis arising out of his coal mine employment, or to have been totally disabled from pneumoconiosis at the time of his death, or to have died from pneumoconiosis, if a chest x-ray, biopsy or autopsy establishes the existence of pneumoconiosis. All the x-ray evidence of record must be examined to

determine whether or not pneumoconiosis is established; a single item of qualifying evidence is not always sufficient to invoke the interim presumption. Mullins Coal Co. v. Director, OWCP., 484 U.S. U.S. 135 (1987). See also, Hamrick v. Schweiker, 679 F.2d 1078 (4th Cir. 1982); Sharpless v. Califano, 585 F.2d 664 (4th Cir. 1978). As set forth above, neither the October, 1955, nor the February, 1959, x-ray meets the classification requirements of 410.428. While Dr. Barton interpreted the most recent x-ray as positive for pneumoconiosis, the same x-ray was interpreted as negative by two qualified B-readers. Thus, the weight of the x-ray evidence is to the contrary, and since there is no evidence of a biopsy or autopsy of record, Claimant has failed to establish the existence of pneumoconiosis pursuant to 410.490(b) (1) (i).

As the miner was employed in the nation's coal mines for less than 10 years, and as there are no pulmonary function studies of record, Claimant cannot invoke the interim presumption under 410.490 (b) (1) (ii). Consequently, the presence of pneumoconiosis has not been proved under 410.490 (b). or by any other means.

In its unpublished decision herein, the Circuit Court stated at page 5 of the slip opinion:

> The 410.490 presumption can be invoked if the claimant can produce x-ray evidence that the miner had pneumoconiosis at the time of his death. The evidence in this case could certainly support such a finding. However, making such a finding is, of course, the job of the ALJ, not this Court. Unfortunately, upon careful review of the

evidence, I am unable to conclude that the decedent had pneumoconiosis at the time of his death. I do not believe that such a finding has been mandated.

Accordingly, upon reconsideration of the record in accordance with the Fourth Circuit's remand, it is found that since Claimant has not established the existence of pneumoconiosis, he is unable to invoke the interim presumption of total disability or death due to the disease. I am therefore constrained to conclude that Claimant has not established entitlement to benefits pursuant to 410.490.

ORDER

Upon the foregoing evaluation in accordance with the provision of 20 CFR 410.490, Claimant's application for black lung survivor's benefits is denied.

ROBERT J. FELDMAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 CFR 725.481, any party dissatisfied with this Order may appeal it to the Benefits Review Board within 30 days from the date of this Order by filing a Notice of Appeal with the Benefits Review Board, 1111 20th Street, N.W., Suite 727, Washington DC 20036. A copy of a Notice of Appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2605, 200 Constitution Avenue, N.W., Washington DC 20210.

SERVICE SHEET

CASE NAME: In the Matter of Jessie Rose, Wid. of Guy T. Rose v. Westmoreland Coal Company and Director, OWCP

CASE NO.: 84-BLA-4072

TITLE OF DOCUMENT: DECISION AND ORDER ON REMAND DENYING BENEFITS

A copy of the above-entitled document was mailed this day to the following parties at the addresses listed as follows:

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-1794

JESSIE ROSE, Widow of Guy T. Rose

Petitioner

versus

WESTMORELAND COAL COMPANY;
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS

Respondents

On Petition for Review of an Order of the Benefits Review Board.

Argued: May 11, 1989 Decided; June 26, 1989

Before HALL and WILKINSON, Circuit Judges, and WILLIAMS, United States District Judge for the Western District of Virginia, sitting by designation.

Henry Smith Keuling-Stout for Petitioner. Ann Brannon Rembrandt (Laura E. Beverage, JACKSON & KELLY on brief); Maria Christine Lisowski (Jerry G. Thorn, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Sylvia T. Kaser, Counsel for Appellate Litigation, U. S. DEPARTMENT OF LABOR, OFFICE OF THE SOLICITOR on brief) for Respondents.

PER CURIAM:

Jessie Rose ("claimant") petitions for review of the Benefits Review Board's ("BRB") affirmance of the Administrative Law Judge's ("ALJ") decision and order denying benefits under the Black Lung Benefits Act ("Act"), 30 U.S.C. 901 et seq. Because the ALJ failed to evaluate the claim under the presumption found at 20 C.F.R. 410.490, we reverse and remand.

I.

Claimant's husband, Guy Rose, worked as a coal miner for the Westmoreland Coal Company. On August 28, 1976, after working a full shift for Westmoreland, Rose died in his sleep from a heart attack. No autopsy was performed, however, he had suffered a previous heart attack only four months earlier.

Claimant filed for survivor's benefits with the

Social Security Administration ("SSA") on September 7, 1976. The claim was denied in July, 1977, and after review, was denied again by the SSA in July, 1980. The claim was then referred to the Department of Labor, which administratively determined that claimant was entitled to benefits. Westmoreland, as the responsible operator, controverted the claim and requested a formal hearing.[2]

At the formal hearing which was held in May, 1986, employment records established that between 1950 and 1976, Rose had worked a total of nine years and seven months for Westmoreland. In support of her claim, claimant introduced chest x-rays taken during three pre-

[2] Because Westmoreland failed to make payments on the claim, on September 1, 1981, the Black Lung Disability Trust Fund paid claimant a lump sum of $17,792.80. The Trust Fund has continued payments in the amount of $293.00 per month.

employment examinations conducted by Westmoreland in 1955, 1959, and 1974. The 1955 film was read as showing early fibrotic changes; the 1959 film showed moderate pulmonary fibrosis and pneumoconiosis with silicotic changes; and the 1974 x-ray was read as lp simple pneumoconiosis. The 1974 film was reread by two B-readers who both concluded that it showed no evidence of pneumoconiosis. There were no blood gas or pulmonary function studies introduced at the hearing, however, claimant did present lay testimony of her husband's diminished capacity to perform his job.

Dr. George Kress, a pulmonary disease specialist, reviewed Rose's medical file, absent the two re-readings of the 1974 x-ray, and concluded that Rose had pneumoconiosis but was not totally disabled from the disease at the time of his death. After reviewing the

reinterpretations of the 1974 film, Dr. Kress opined that his conclusion as to pneumoconiosis was now questionable; however, he continued to believe that Rose was not totally disabled at the time of his death. Dr. George Zaldivar, another pulmonary specialist, concluded upon review of Rose's complete file that it was unlikely that he suffered from pneumoconiosis and that pneumoconiosis could not have played any part in his death.

Based on this evidence, in an order issued March 20, 1987, the ALJ denied benefits. He reasoned that because Rose had not worked the requisite ten years to gain the benefit of the interim presumption found at 20 C.F.R. 727.203, to be entitled to benefits claimant had to prove that Rose was totally disabled due to pneumoconiosis at the time of his death under 20 C.F.R.

Part 410. The ALJ then concluded that in light of the equivocal evidence of pneumoconiosis and the fact that Rose worked a full shift the day that he died, claimant had not proven her entitlement. On appeal, the BRB affirmed the findings of the ALJ as being supported by substantial evidence. This petition for review followed.

II.

Claimant's only contention is that the failure of the ALJ and the BRB to evaluate her claim under the presumption found at 20 C.F.R. 410.490 was reversible error.[3] We agree.

In Broyles v. Director, O.W.C.P., 824 F.2d 327, 329 (4th Cir. 1987), this Court held that for claims

[3] In her opening brief, claimant also contended that the Director, O.W.C.P., violated his duties under the Act by not assisting her in her appeal before the BRB. We do not address this contention because after the Director filed a brief in this Court supporting claimant's request for a remand, she conceded that the Director's duties had been fulfilled.

involving short-term miners (those with less than ten years of coal mine employment) that were filed prior to the promulgation of the permanent regulations found at 20 C.F.R. Part 718, the interim presumption of 410.490 must apply. [4]

We reached this conclusion because the petitions in Broyles, just like this claim, involved short-term miners, who, because of their lack of ten years of service, could receive no benefit from the Labor Department's interim presumption, 20 C.F.R. 727.203. This case is on all fours with Broyles and should have been evaluated under 410.490.[5]

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[4] Our holding in Broyles, as well as its underlying rationale, was recently affirmed by the Supreme Court in Pittston Coal Group v. Sebben, ___ U.S. ___, 109 S.Ct. 414 (1988).

[5] Westmoreland argues that because claimant did not raise the Broyles issue in her brief which, parenthetically, was filed before Broyles was decided, she should be precluded from

Westmoreland contends that this error does not require a remand because claimant's medical evidence cannot support invocation of the presumption. We find this contention meritless. The 410.490 presumption can be invoked if the claimant can produce x-ray evidence that the miner had pneumoconiosis at the time of his death. The evidence in this case could certainly support such a finding. However, making such a finding is, of course, the job of the ALJ, not this Court. Therefore, we remand this case to the BRB with instructions to remand to the ALJ for further proceedings consistent with this opinion.

REVERSED AND REMANDED

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raising the issue in this Court. We do not agree. Broyles was decided over one year before the BRB rendered its decision in this case and the Board's failure to apply 410.490 was a clear error of law.

410.490 Interim adjudicatory rules for certain Part B claims

filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with

the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that the impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disable due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see 410.428): or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic

respiratory or pulmonary disease (which meets the requirements for duration in 410.412(a)(2) as demonstrated by values which are equal to or less than the values specified in the following table:

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine

employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see 410.412(a)(1), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see 410.412(a)(1)).

557. Initial decision; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions --

(1) proposed findings and conclusion; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decision; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions,

are a part of the record and shall include a statement of --

(A) findings and conclusions, and the reasons or basis therefore, on all the material issues of fact, law, or discretion presented on the record; and